No. 769

In The Supreme Court Of The United States

OCTOBER TERM, 1924

CHEUNG SUM SHEE, CHEUNG WAI MUN, FONG GOON HONG, RED HING FONG, WONG BEN JUNG, HONG CHOW JUNG, MOK LIN PARK, NG SHEE, On Habeas Corpus,

Appellants and Petitioners,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee and Respondent.

CERTIFICATION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion for Leave to file Brief as *Amicus Curiae*, and Proposed Brief of *Amicus Curiae*

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Gateway Printing Co., 500 Collins Bldg., Seattle, Washington

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MOTION

John J. Sullivan, Roger O'Donnell and W. J. Peters, desiring, *amicus curiae*, to submit to this court their brief on behalf of the appellants and petitioners herein, respectively show:

That they are the attorneys for the petitioners in *Ex parte Goon Dip*, 1 F. (2d) 811, 813, 814. This was an application to the United States District Court for the Western District of Washington, Northern Division, for a writ of habeas corpus on behalf of seventeen Chinese persons who applied for admission

to the United States at the Port of Seattle subsequent to July 1, 1924, claiming to be respectively the wives and minor children of Chinese merchants lawfully domiciled in the United States. They were denied admission by the Commissioner of Immigration upon the ground that, admitting their claimed status, they were inadmissible under the provisions of the Immigration Act of 1924. This finding was sustained by the Secretary of Labor. It was held by Judge Neterer that the wives and minor children of Chinese merchants lawfully domiciled in the United States were admissible under the provisions of the Act in question, and the writs were granted. An appeal from the judgment being taken by the government, it was stipulated by respective counsel that such appeal presented the identical questions to be determined by this court in this cause, and that the same should await, and abide by such determination.

It is therefore apparent that the petitioners in *Ex parte Goon Dip* are vitally interested in the questions to be determined herein by this court, and their counsel deem it their duty to present their brief, *amicus curiae*, and most respectfully moves that the same be filed and considered.

STATEMENT OF FACTS

The petitioners herein claiming to be respectively the wives and minor children of Chinese merchants

lawfully domiciled in the United States, applied for admission at the Port of San Francisco subsequent to July 1, 1924, at which time the Immigration Act of 1924 became effective. Without investigation as to the mercantile status of the husband and father, nor the applicants' relation to him, the Commissioner of Immigration denied them admission, and upon appeal to the Secretary of Labor it was held that, conceding the relationship and the mercantile status of the husband and father, they were inadmissible as a matter of law,

> "* * * because of the inhibition against their coming to the United States as found in paragraph (c) of section 13 and that portion of section 5 which reads as follows: 'An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.'"

Thereupon the petitioners applied to the United States District Court for the Northern District of California, Southern Division thereof, Second Division, for a writ of habeas corpus, claiming that they were respectively the wives and minor children of Chinese merchants lawfully domiciled in the United States, and as such were lawfully entitled to admis-

sion, and that they were illegally restrained by the Commissioner of Immigration at San Francisco, and praying that they be restored to their liberty. From an adverse judgment petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court certified the following question to the Supreme Court of the United States:

> "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled in the United States prior to July 1, 1924, such wives and children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?"

ARGUMENT

In support of our contention that the question submitted to this court for its determination should be answered in the negative, we shall discuss what we consider to be the two major propositions involved.

> 1. The right of the wives and minor children of Chinese merchants lawfully domiciled in the United States to enter the United States prior to the Immigration Act of 1924.

The right of the wives and minor children of Chinese merchants lawfully domiciled in the United States to enter the United States prior to the Immigration Act of 1924, is conceded, and we call particular at-

tention to the source of that right, not for the purpose of showing that it existed, but because of the light which it throws upon the intention of Congress in enacting the law in question.

This right does not depend upon statutory enactment, but is based upon treaty stipulations between the United States and China. We quote first from Article V of the Burlingame Treaty of 1868 (Malloy's Treaties, Vol. 1, p. 211.)

> "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade or as permanent citizens." * * *

> "Article VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may be enjoyed by the citizens or subjects of the most favored nation; and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

The treaty of 1880 (Malloy's Treaties, Vol. 1, p. 237) provides, in Article I, that the Government of the United States may, if in its opinion it becomes necessary, limit or suspend the coming of Chinese laborers into the United States, and adds:

> * * * "The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." * * *
>
> "Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiousity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Following this came the Convention Regulating Chinese Immigration of 1894. (Malloy's Treaties, Vol, 1, p. 241). This treaty, to be in force for the period of ten years, provides in Article III, that,

> "The provisions of this Convention shall not effect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. * * *"

In 1903, these countries entered into a "Treaty as to Commercial Relations, (Malloy's Treaties, Vol. 1, p. 261) and declaring the United States and China to be "animated by an earnest desire to extend further the commercial relations between them," provided in Article XVII, as follows:

> "It is agreed between the High Contracting Parties hereto that all the provisions of the several treaties between the United States and China which were in force on the first day of January, A. D. 1900, are continued in full force and effect except in so far as they are modified by the present treaty or other treaties to which the United States is a party."

It will be observed that the Treaty of 1880, Article II, specifically enumerates the classes of Chinese subjects *"who shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."* Chinese merchants are one of the classes enumerated. Succeeding treaties and conventions do not establish or create the right of these classes to enter the United States—they simply recognize and contintue the right.

The right of the wives and minor children of Chinese merchants lawfully domiciled in the United States, is declared by Judge Deady *in re Chung Toy Ho,* 42 Federal 398, *to be a treaty right,* a right based upon the Treaty of 1880, between the United States and China. He says: :

> "It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children, particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn into the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France."

In the case of the *United States vs. Gue Lim*, 83 Federal 136, Hanford, District Judge, held with Judge Deady upon this question. This case being appealed to the Supreme Court of the United States, (176 U. S. 459; 44 Law Ed. 544) that court, after quoting Article II, of the treaty, says:

> "It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty; * * * The act was never meant to establish the result of permanently excluding the wife under the circumstances of this case, and we think that, properly

and reasonably construed, it does not do so. If we hold that she is entitled to come in as the wife, because the true construction of the treaty and act permits it, there is no provision which makes the certificate the only proof of the fact that she is such wife. In the case of minor children the same result must follow as that of the wife."

In the case of *Yee Yon vs. White,* 256 U. S., 399, which turned upon the construction of section 6 of the Act of July 5, 1884, Mr. Justice McReynolds, speaking for the court, says:

> "* * * that the section should not be construed to exclude their wives, since *this would obstruct the plain purpose of the treaty of 1880, to permit merchants freely to come and go.*" (Italics ours.)

It is thus fixed and established that Article II of the Treaty of 1880, between the United States and China, as construed by the Federal Courts, including this court, was in full force and effect on July 1, 1924, and that it accorded to the wives and minor children of Chinese merchants lawfully domiciled in the United States, the right to enter this country; *the right to "go and come of their own free will and accord."*

The second proposition is:

2. Does the Immigration Act of 1924, exclude from admission to the United States the wives and minor children of Chinese merchants lawfully domiciled in this country?

At the very outset there seems to be a complete and decisive answer to this question. That answer is contained in the suggestions made to the Committee on Immigration and Naturalization by Secretary Hughes, and the changes made in the bill as reported by the Committee, in accordance with the suggestions made by the Secretary.

In his letter of February 8, 1924, addressed to Hon. Albert Johnson, Chairman of the Committee (Appendix, p. 25 Minority Report Committee on Immigration and Naturalization) referring to the immigration bill then before the committee, Secretary Hughes says:

> "It is hardly necessary for me to say that I am in favor of suitable restrictions upon immigration. The questions which especially concern the Department of State in relation to the international effects of the proposed measure are these:: (1) The question of treaty obligations; * * *"

> First—Treaties.—According to the terms of the proposed measure "immigrant" is defined (sec. 3) as "any alien departing from any place outside the United States destined for the United States, except (quoting subdivisions 1 to 5 inclusive as contained in the Act)."

> The result is that under this definition of "immigrant" all aliens are subject to the restrictions of the proposed measure unless they fall within the stated exceptions. The question at once arises

whether there would be aliens not falling within those exceptions who would be entitled to be admitted under our treaties.

* * * * * * *

In my opinion the restrictions of the proposed measure, in view of their application under the definition of "immigrant," are in conflict with treaty provisions. The exception in subdivision (2) of section 3 with respect to aliens visiting the United States "temporarily for business or pleasure" would not meet the treaty requirements to which I have referred, for this phrase would seem to indicate a stay more temporary than that permitted by these provisions, and the right established by treaty can not be cut down without a violation of the treaty so long as it is maintained in force. Accordingly I take the liberty of suggesting that there be included in section 3 of the proposed measure an additional exception to read as follows: :"an alien entitled to enter the United States under the provisions of a treaty."

I should add that the persons entitled to enter and reside here under the terms of our treaties for the purpose of trade and commerce are not those against whom immigration restrictions are deemed to be necessary."

Referring to this suggestion of Secretary Hughes, the Committee, in its report, at page 2, says:

"The suggestion of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to

section 3 (p. 5) of an additional exempted class, to-wit:

> (6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

The original suggestion of Secretary Hughes was for an exemption in these words:

> "An alien entitled to enter the United States under the provisions of a treaty."

Subsequently the Secretary suggested the following words:

> "An alien entitled to enter the United States under the provisions of an existing treaty."

> The committee has incorporated in H. B. 7995 Secretary Hughe's proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation.

* * * * * * *

> Your committee feels that this additional exemption * * * is broad enough to take care of all the clauses of our commercial treaties * * *"

It will be noted that the additional exception to section 3, as proposed by Secretary Hughes, and the

exception (subdivision 6) as added by the committee, differ in this important respect: In the former it was proposed to except *all aliens entitled to enter the United States under the provisions of an existing treaty,* while the latter excepts those aliens only who are entitled to enter the United States *solely to carry on trade under in pursuance of the provisions of a present existing treaty of commerce and navigation.*

The treaty between this country and China being recognized and conceded to be one of commerce and navigation, and it being the expressed intention of the committee to except from the restrictions of the Immigration Act of 1924, aliens entitled to enter solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation, and as Article II of the treaty with China, as construed by the Supreme Court, accords the right of entry to his alien wife and minor children as well as to the merchant himself, the sole remaining question to be discussed is:

Does the act express the avowed intention of the committee?

Many provisions of the act, tending to support the position of counsel for the petitioners, are cited and discussed in their elaborate and able brief. We confine ourselves solely to those provisions of the act which

are cited by the Secretary of Labor in support of his finding that these petitioners are inadmissible as a matter of law. He cites two provisions of the act, as follows:

Paragraph (c) of section 13, which reads:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife or unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

That portion of section 5 which reads as follows:

> "An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

It is plain that the Secretary of Labor construes paragraph (c) of section 13 to exclude these petitioners because, (1) they are aliens ineligible to citizenship, and (2) because they are not specified in the exceptions; taking the position that they are not non-immigrants as specified in subdivision (6) of section 3. As to the quoted portion of section 5, the Secretary's position must be that the merchant husband is a non-immigrant under the provisions of subdivision

(6) of section 3, and that his wife and minor children seek admission solely by reason of their relationship to such non-immigrant, and are therefore excluded under the provisions of section 5.

SUMMARY

When the committee, following the suggestion of Secretary Hughes, added subdivision (6) to section 3, making the section read, so far as is pertinent here:

> "When used in this act the term "immigrant" means any alien departing from any place outside the United States destined for the United States except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

it was for the express purpose of preserving to aliens the right to enter the United States when so entitled under the provisions of an existing treaty of commerce and navigation. The committee had before it the fact that such a treaty between the United States and China was in existence, and that this treaty, as construed by the Supreme Court, accorded the right of entry to the Chinese merchants and their Chinese wives and minor children. By the addition of subdivision (6) to section 3 the committee intended to, and did, include all aliens entitled to enter the United States under an existing treaty of commerce and navigation.

The position of the Secretary of Labor is that the

wives and minor children, being related to their non-immigrant husband and father, are excluded under the provisions of section 5, *"by reason of such relationship."* This ignores the fact that these wives and children *are themselves* exempted by subdivision (6) of section 3, and, equally with the father, are within the terms of Article III of the treaty with China, being aliens *"entitled to enter the United States solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation."* Such a construction squares exactly with the avowed purpose and intention of the committee, for in its report it says, at page 2:

> "The committee has incorporated in H. B. 7995 Secretary Hughes' proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation."
>
> * * * * * * *
>
> " * * * Your committee feels that this additional exemption does not pass the control from Congress, and feels also *that it is broad enough to take care of all the clauses of all our commercial treaties,* * * * " (Italics ours).

These petitioners are not excluded under the provisions of paragraph (c) section 13 because they are not immigrants as defined by section 3. They are not effected by the provisions of section 5 because

they are included in, and exempted by the provisions of subdivision (6) of section 3.

We respectfully maintain that the question certified to this Honorable Court for its determination should be answered in the negative.

Respectfully submitted,

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